



- (2) Fund liability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes:

- (1) Claimant should be awarded benefits based upon a work disability and specifically should be awarded benefits based on thirty-one percent (31%) permanent partial general disability up through December 6, 1993, and twenty-five percent (25%) permanent partial general disability thereafter.

Claimant sustained bilateral carpal tunnel syndrome as a result of his work duties as a meat cutter for respondent. Dr. Storm performed surgery and recommended physical therapy. In the course of a work hardening program, claimant stepped off a treadmill and injured his knee.

The Administrative Law Judge awarded claimant benefits based upon functional impairment only. The Administrative Law Judge concluded that claimant did not prove by a preponderance of the credible evidence that he had sustained a work-related disability in excess of the functional impairment.

Claimant contends he should be awarded benefits based upon work disability. Claimant bases his contention on evidence that the restrictions placed upon him as a result of his injuries prevented him from returning to his employment for respondent. Although he obtained new employment in a similar position at a different supermarket, the duties in the new position are less demanding and he does not expect to earn as much overtime pay in his new position. Finally, claimant points to uncontroverted testimony by a vocational expert that the injury caused claimant to suffer loss of ability to access the open labor market.

The Appeals Board agrees with claimant's contentions. Claimant's employment at respondent Food Barn required that he unload trucks lifting up to one hundred fifty (150) pounds. He testified he operated meat cutting equipment, doing the repetitive activities which led to his carpal tunnel condition, forty-five (45) to fifty (50) minutes per hour.

Dr. Prostic provided the only medical testimony. He recommended claimant avoid work which requires heavy lifting or carrying or repeated forceful use of his hands. He also recommended he not lift objects weighing more than thirty (30) pounds. Work for respondent would have violated the restrictions recommended by Dr. Prostic.

Claimant's new employment as a meat cutter for Schnuck's did not, on the other hand, require that he unload trucks. While the testimony of Mr. Quade suggests claimant may be required to perform more meat cutting work in his new employment than claimant's own testimony suggests, claimant's testimony is nevertheless convincing evidence that the work is less demanding at his subsequent employment with Schnuck's than they had been at Food Barn.

Mr. Gary Gammon gave the only expert opinions regarding the impact of claimant's injuries upon his ability to earn a comparable wage and ability to obtain employment in the

open labor market. He gave uncontroverted testimony that claimant's injuries caused him to suffer a loss of 38.71% access to the open labor market.

Although claimant's base wage at his subsequent employment for Schnuck's was similar to his base wage at Food Barn, the evidence reflects a loss in total average weekly wage as calculated in K.S.A. 1992 Supp. 44-511. At the time of the accident claimant's average weekly wage, including overtime and fringe benefits, was \$716.52. At his new employment with Schnuck's claimant earned an average weekly wage of \$550 including some overtime. He became eligible for and received fringe benefits having a value of \$98.08 per week effective December 6, 1993. Thereafter his average weekly wage at his new employment became \$648.08. The evidence also establishes that claimant was not likely to have the opportunity to work as much overtime as he had at Food Barn. The Appeals Board therefore finds that claimant sustained a loss of ability to earn a comparable wage of twenty-three percent (23%) up to the time he became eligible for fringe benefits and ten percent (10%) thereafter.

In his brief, claimant has made calculations which appear to assume that the date of accident would be November 1, 1992. This is the stipulated beginning date for a series of minitraumas which resulted in the bilateral carpal tunnel injury. However in carpal tunnel cases the last date worked must be used as the date of accident. See Berry v. Boeing, Case No. 71,007 (Ks. Sup. Ct., Dec. 1994). In this case the parties have stipulated to injury through June 21, 1993. Although it appears claimant may have worked some after that date, it is not entirely clear from the record. In view of the stipulation, June 21, 1993 will be used as the date of accident from which benefits are calculated.

Based upon giving equal weight to the loss of access and loss of ability to earn comparable wage factors, the Appeals Board finds claimant is entitled to benefits based upon a thirty-one percent (31%) work disability up through December 6, 1993 and a twenty-five percent (25%) work disability thereafter. Hughes v. Inland Container, 247 Kan. 407, 799 P.2d 1011 (1990).

(2) The Appeals Board finds that the Kansas Workers Compensation Fund should not be liable for any portion of the benefits awarded.

In the course of work hardening for his bilateral carpal tunnel injuries, claimant suffered an additional injury to his knee. Dr. Prostic testified the knee injury resulted in an additional three percent (3%) disability to the body as a whole and further testified that the additional disability would not have occurred but for the pre-existing carpal tunnel impairment. The Administrative Law Judge found that the additional three percent (3%) should be paid by the Kansas Workers Compensation Fund.

The Appeals Board first notes that the work disability awarded in this case accounts for the injured knee. The Appeals Board finds that the Kansas Workers Compensation Fund should not be considered liable for any of the amounts awarded. The Kansas Workers Compensation Fund provisions of the Workers Compensation Act are designed to encourage employment and retention of individuals with a pre-existing handicap. In this case the injury occurred in the course of treatment respondent was legally obligated to provide. Respondent would have been liable for benefits from that injury even if respondent had terminated claimant's employment before the injury. Imposing liability on the Kansas Workers Compensation Fund under these circumstances does not advance

the purpose or support the policy underlying the Kansas Workers Compensation Fund liability.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer should be, and the same is hereby, modified as follows:

The claimant is entitled to 10.57 weeks of temporary total disability compensation at the weekly rate of \$299.00, in the sum of \$3,160.43, plus 13.57 weeks of permanent partial disability compensation at the weekly rate of \$148.09 in the sum of \$2,009.58 for 31% disability up to December 6, 1993 and 390.86 weeks at the rate of \$119.43 in the sum of \$46,680.41 thereafter for a 25% disability, making a total award of \$51,850.42.

As of May 1, 1995 there would be due and owing 10.57 weeks of temporary total disability at the rate of \$299 per week in the sum of \$3,160.43, plus 13.57 weeks of permanent partial disability at the rate of \$148.09 per week for 31% disability in the sum of \$2,009.58 and 73 weeks of permanent partial disability at the rate of \$119.43 in the sum of \$8,718.39 making a total amount due of \$13,888.40, less any amounts previously paid.

Thereafter, the remaining compensation of \$37,962.02 is to be paid claimant at the weekly rate of \$119.43 per week for 317.86 weeks or until further order.

Further award is made that the claimant be entitled to future medical treatment for the bilateral upper extremity injuries and the payment to him of the sum of \$350 as an unauthorized medical allowance, all at the expense of respondent.

Further award is made that the claimant's contract of employment with his attorney has not been made a part of the record. However, the claimant's attorney is granted a lien against the proceeds of this award of not more than 25% pursuant to K.S.A. 1992 Supp. 44-536.

Further award is made that all necessary fees to defray the expense of the administration of the Workers Compensation Act for the State of Kansas be assessed against the respondent as follows:

Hostetler & Associates, Inc.	\$511.85
Gene Dolginoff Associates, Ltd.	\$1,019.75

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c:     Keith L. Mark, Mission, Kansas  
       Robert D. Benham, Kansas City, Kansas  
       Jeffrey A. Dehon, Kansas City, Kansas  
       Alvin E. Witwer, Administrative Law Judge  
       George Gomez, Director